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Supreme Court, U.S.
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No. 99-991

IN THE SUPREME COURT OF THE UNITED STATES
October 1999 Term

B.J. GRIFFITH, GORDON GRIFFITH and
DELTA WASTE RECOVERY, INC.
Petitioners

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL
AND ECOLOGY, EAST ARKANSAS PLANNING AND
DEVELOPMENT DISTRICT and EAST ARKANSAS
REGIONAL SOLID WASTE MANAGEMENT DISTRICT
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May an action for money damages against a State agency be maintained in federal court.

PARTIES TO THE PROCEEDING

Petitioners

B.J. Griffith, Gordon Griffith and Delta Waste Recovery, Inc.

Respondents

Arkansas Department of Pollution Control and Ecology[1]; East Arkansas Planning and Development District; and East Arkansas Regional Solid Waste Management District[2].

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[1]Pursuant to Act 1219 of 1997 of the Arkansas General Assembly, the Arkansas Department of Pollution Control and Ecology had its name changed to the Arkansas Department of Environmental Quality. The style of this case reflects the agency's former name.

[2]The District Court dismissed Petitioners' claims against the East Arkansas Planning and Development District ("EAPDD") and the East Arkansas Regional Solid Waste Management District ("EARSWMD") for failure to state a claim. (Pet at App. B-5 - B-9). That dismissal was not based on the sovereign immunity of Arkansas or its officers. Petitioners present one question for review: the immunity of the State and its officers against suit in this case. That question does not concern EAPDD or EARSWMD, or touch the District Court's dismissal of all Petitioners' claims against those two entities for failure to state a claim.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the U.S. Constitution and Article V, Section 20 of the Arkansas Constitution.

STATEMENT OF THE CASE

The Arkansas Department of Pollution Control and Ecology (ADPC&E), now known as the Arkansas Department of Environmental Quality, is a state agency charged with administering and enforcing the state's solid waste program. Under the provisions of the Solid Waste Management Act, A.C.A. § 8-6-201 et seq., a permit is required to construct or operate any solid waste processing or disposal facility. Delta Waste Recovery, Inc. obtained a permit from ADPC&E in 1991 to construct and operate a material recovery facility located in Madison, Arkansas. A solid waste permit authorizes a permittee to construct and operate a solid waste processing or disposal facility. The issuance of a state permit does not guarantee the permittee financial success, nor does a solid waste permit, or license, grant "recycling rights" as stated by Petitioners (Pet., p.2).

In 1989, the state legislature enacted the Solid Waste Management and Recycling Act, A.C.A. § 8-6-601 et seq., which creates a grant program to assist solid waste management districts and local governments with developing solid waste management plans, programs, and facilities that integrate recycling into their solid waste management systems. The grant program is intended to promote recycling as part of the development of regional solid waste management systems that will meet the solid waste needs of the state in an efficient, cost-effective, and environmentally sound manner. A.C.A. § 8-6-602. The grant program does not grant "recycling rights" as stated by Petitioners (Pet., p. 2).

Funding for the recycling grant program comes from solid waste disposal and collection fees collected from landfill permittees and solid waste transporters. The fees collected are deposited in the State Treasury to the credit of the Solid Waste Management and Recycling Fund. A.C.A. §§ 8-6-607 and 8-6-

609. The fees collected pursuant to the provisions of the Solid Waste Management and Recycling Act are the source of funding for the recycling grants, not federal money as stated by the Petitioners (Pet., p. 2). Fees collected are allocated among the regional solid waste management districts according to the provisions of A.C.A. § 8-6-609(b). Each regional solid waste management district is responsible for the grant application process and acceptance of grant applications from its district members. A.C.A. § 8-6-609(c)(5)(A).

Costs eligible for grant assistance include costs for solid waste management planning that integrates recycling, costs for public information and education programs that encourage waste reduction and stimulate demand for products produced from recycled materials, costs of waste transfer facilities that integrate recycling in their operations, costs of recycling equipment, and recycling program and market development costs. A.C.A. § 8-6-609(c)(1). The Solid Waste Management and Recycling Act authorizes ADPC&E to make a determination about whether grant money may be used for purchasing mechanical processing equipment or facilities. A.C.A. § 8-6-609(c)(2). ADPC&E does not issue permits as part of the grant program as suggested by Petitioners (Pet., p. 2). Any facility requiring a solid waste permit, must obtain one from the Department for construction and operation regardless of the source of funding. The Department has not issued permits or awarded grants to intentionally drive Petitioners out of business as stated by Petitioners (Pet., p. 2).

In 1998, Petitioners filed suit in federal court naming as a party the Arkansas Department of Pollution Control and Ecology, a state agency, and seeking money damages. Petitioners' complaint failed to identify any intentional acts of individual state employees. ADPC&E filed a motion to dismiss which was granted by the District Court. The District Court held:

> A state is not a "person" within the meaning of 42 U.S.C.A. § 1983 and thus may not be sued under that statute. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Moreover, the Eleventh Amendment to the United States Constitution bars section 1983 suits against state governments in federal courts. *Quern v. Jordan*, 440 U.S. 332 (1979). An agency or department of state government, such as ADPCE, is undisputably an entity of the state for purposes of the Eleventh Amendment. *See, e.g., Will*, 491 U.S. at 70. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as. the defendant is proscribed by the Eleventh Amendment. The bar exists whether the relief sought is legal or equitable." *Papsan* [sic]*v. Allain*, 478 U.S. 265, 276 (1986). Accordingly, Plaintiffs' § 1983 claims against the ADPCE are prohibited by the Eleventh Amendment.

[footnote omitted].

The Eighth Circuit concluded that the lower court correctly analyzed the relevant legal principles as they applied to the facts of the case, determined that there was no precedential value in providing an extended opinion, and affirmed the lower court without further discussion. The Petitioners filed a petition for rehearing en banc with the Eighth Circuit which was denied.

SUMMARY OF ARGUMENT FOR DENYING WRIT

The United States District Court for the Eastern District of Arkansas properly dismissed the federal law claims against the State of Arkansas, Department of Pollution Control and Ecology, and that decision was properly affirmed. The State is immune from suit for money damages in federal court under the Eleventh Amendment and 42 U.S.C. § 1983. This Court has previously decided these issues, and there is no dispute or conflict to be resolved which would be served by this Court's granting the Petition for Writ of Certiorari in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE LOWER COURTS CORRECTLY HELD THE STATE IS NOT A "PERSON" FOR THE PURPOSE OF 42 U.S.C. § 1983

The federal law claims against the State of Arkansas, Department of Pollution Control and Ecology, were properly dismissed in this case. The issues presented to the lower courts involve questions of Eleventh Amendment sovereign immunity which have previously been decided by this Court. There is no issue of first impression, nor any dispute or conflict which would be served by the Court's granting a Writ of Certiorari in this case.

The United States District Court, Eastern District of Arkansas, properly dismissed Petitioners' federal law claims against the State of Arkansas, pursuant to 42 U.S.C. § 1983 and Eleventh Amendment sovereign immunity. The decision was properly affirmed by the Eight Circuit Court of Appeals. Neither court addressed Petitioners' state law claims because the case was dismissed on federal grounds. The weight of legal jurisprudence is behind the State in this case, and the Court need not revisit the decisions of the lower court.

This Court has held that a State is not a "person" within the meaning of 42 U.S.C. § 1983, and thus may not be sued under that federal statute. *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The Court's decision has been followed by various federal courts, and the decisions of the Eighth Circuit are not in conflict with this Court's ruling. *See Murphy v. State of Ark.*, 127 F.3d 750 (8th Cir. 1997); *Burk v. Beene*, 948 F.2d 489 (8th Cir. 1991).

The District Court's decision, which was affirmed by the Eighth Circuit Court of Appeals, properly relied upon this Court's holding in *Will v. Michigan Dept. Of State Police., supra.* The District Court held that, "[a]n agency or department of state government, such as ADPCE, is undisputably an entity of the state for purposes of the Eleventh Amendment." (*See* Pet. App. B, p. B-5).

2. THE ELEVENTH AMENDMENT BARS SUIT AGAINST UNCONSENTING STATES

The Eleventh Amendment to the United States Constitution removed the jurisdiction of the federal courts over suits filed against the states by citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). This Court has stated, "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Will v. Michigan Dept. of State Police*, 491 U.S. at 70; *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct., 2932, 92 L.Ed.2d 209 (1986) (*quoting Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984)). The District Court in this case relied upon this Court's precedents and specifically quoted the rule from *Will* when rendering its decision (*See* Pet. App. B, p. B-5).

The Petitioners seek to impose liability upon the public funds of the State Treasury by bringing this suit in federal court. Such suits by private parties are precluded by the Eleventh Amendment if the State has not consented to suit. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). This same rule has been invoked in decisions of the Eighth Circuit. *Hadley v. North Ark. Community Tech. Coll.*, 76 F.3d 1437 (8th Cir. 1996), *reh'g and suggestion for reh'g denied, cert. den.* 519 U.S. 1148, 117 S.Ct. 1080, 137 L.Ed.2d 215 (1997); *Dover Elevator Co. v. Arkansas State University*, 64 F.3d 442, (8th Cir. 1995).

3. THE STATE OF ARKANSAS HAS NOT CONSENTED TO BEING SUED IN FEDERAL COURT AND THE DECISION IN THIS CASE IS NOT INCONSISTENT WITH OTHER CASES IN THE EIGHTH CIRCUIT

Absent a state's consent to being sued or a specific abrogation of sovereign immunity, the Eleventh Amendment acts as an absolute bar to suits against a state in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). For purposes of this suit and all others, ADPC&E, an agency of the State, is the State. *Edelman v. Jordan, supra*. The State of Arkansas has not waived its immunity (see Ark. Const., art. V § 20) and Congress has not acted to abrogate that immunity in this matter. The Petitioners brought suit pursuant to a federal civil rights statute, 42 U.S.C. §1983. It is now clear to all that Congress, in enacting Section 1983, did not abrogate sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

Petitioners point out the test articulated in *Seminole Tribe* in their brief (Pet., p. 5). However, Petitioners claim that the State has consented to being sued by participating in what is called "a federal spending program" (Pet., p. 5). Petitioners also argue that a conflict exists in the Eighth Circuit on this issue which would be served by this Court's granting of Certiorari (Pet., p. 4). Petitioners' argument that suit should be maintained against the State fails on both counts. First, The State has not waived its sovereign immunity. The Arkansas Department of Pollution Control and Ecology received no federal funds for the grants at issue in the instant case.[3]

[3]The State also points out that even if federal funds were involved in the grants, this Court held in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 105 S. Ct. 3142, 87 L.Ed.2nd 171 (1985) that "the mere receipt of federal funds does not establish that a State has consented to suit in federal court."

Secondly, decisions of the Eighth Circuit Court of Appeals which are cited by Petitioners are not in conflict with other decisions of that court, and are distinguishable from the instant case because the cases cited involve a statute in which a clear declaration of waiver or congressional abrogation of the State's sovereign immunity is present or where federal funding is involved.

For example, in *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745 (8th Cir. 1999), and *Little Rock School Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999), two cases cited by Petitioners (Pet., p. 5), both cases involved the Individuals With Disabilities Act ("IDEA"). Section 1403 of the IDEA contains what the Eighth Circuit Court of Appeals referred to as, "an unambiguous waiver of the States' Eleventh Amendment Immunity." The Eighth Circuit Court of Appeals held that by participating in the federal spending program created by the IDEA statute, the State waived its sovereign immunity with respect to that statute, which contains a clear and unambiguous waiver of immunity. *Bradley v. Ark. Dept. Of Educ.*, 189 F.3d at 753. No such clear and unambiguous waiver of immunity exists in the instant case.

Petitioners also cite *College Sav. v. Florida Prepaid Postsecondary*, ___ U.S. ___, 119 S.Ct. 2219 (1999), which is in fact analogous to the instant case. In that case, this Court held that federal courts have no jurisdiction to entertain a suit against a state because the Trademark Act of 1946 did not abrogate the State's sovereign immunity, nor did the State voluntarily waive its sovereign immunity. The Court restated its own rule that a State's waiver of its sovereign immunity must be unequivocal. The Court noted that a "clear declaration" by the State of its waiver is required in order to be certain that the State in fact consents to being sued. The sovereign immunity of the State of Arkansas has not been waived or abrogated in this case. Therefore, the State is not subject to suit in federal court.

A strict standard is applied to determine if a State has waived its Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990); *Edelman v. Jordan, supra.* The Eighth Circuit Court of Appeals, relying upon this Court's holding in *Port Authority Trans-Hudson Corp.*, has held that, "[w]hile Eleventh Amendment immunity may be waived, such waiver must be unequivocally expressed." *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). This Court has also held that Congressional abrogation of sovereign immunity must be exercised with "unmistakeable clarity". *Blatchford v. Native Village of Noatuk and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), *appeal after remand*, 38 F.3d 1505 (9th Cir. 1994). Neither a clear expression of waiver nor an unmistakably clear abrogation of immunity has occurred in this case.

Over two decades ago, the specific issue which has been raised by Petitioners was addressed by this Court. This Court held that Congress did not abrogate Eleventh Amendment immunity by enacting the federal civil rights statute, 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). The decision of the Court in *Quern, supra,* is often cited and holds true today. The decisions of the Eighth Circuit echo the Court's ruling in *Quern*. *See Williams v. State of Missouri*, 973 F.2d 599 (8th Cir. 1992); *Burk v. Beene, supra.* This Court need not revisit these issues.

4. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The United States District Court for the Eastern District of Arkansas dismissed Petitioners' claims based upon federal law grounds. The lower courts did not address Petitioners' state law claims. Petitioners failed to identify any intentional acts of

individual state employees in their suit for money damages.

The District Court properly granted the State's Motion to Dismiss which was properly affirmed without comment by the Eighth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,
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APPENDIX

Article V, Section 20 of the Arkansas Constitution of 1874

Sec. 20. State not made defendant.

The State of Arkansas shall never be made defendant in any of her courts.